

**Luncheon Remarks**  
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**PMA 29<sup>th</sup> Annual Promotion Marketing Law Conference**  
**“Who’s In Control Now: Navigating Tumultuous Marketing Change”**

**Friday, November 16, 2007**  
**12:30 p.m.**



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to-consumer-to-consumer marketing model presents powerful new opportunities for consumers as well as marketers and, not surprisingly, raises questions about the application of traditional advertising laws, such as the FTC Act. The fact is that traditional advertising laws *still* apply to product promotion in these new settings. And the FTC has been active in promoting this message in three ways.

First, the FTC has provided industry with specific guidance on one of these new marketing strategies – word-of-mouth marketing. Of course, word-of-mouth marketing by a satisfied, or a dissatisfied, consumer is one of the most compelling forms of marketing that exists. It is not new – we have always sought and provided product recommendations to our friends and family. Indeed, one popular ad from the 70s was premised on this word-of-mouth concept. The ad invited people to use a shampoo and urged them to tell two friends, and then they’ll tell two friends, and so on and so on and so on. Well, of course, back then, we had no idea of how many friends we would be able to reach through blogs and social networking sites on the Internet. But the concept is the same, and so is the applicable law.

In 2006, the FTC staff issued an opinion letter on the 21<sup>st</sup> century version of word of mouth marketing – where a company pays individual consumers to promote its products.<sup>2</sup> The principles set out in that letter are really basic advertising 101: Consumers are likely to evaluate a “consumer” endorsement differently if they believe it is independent as opposed to being sponsored in some way. Therefore, unless the relationship is clear from the context, a failure to disclose the relationship between the marketer and the consumer endorser is deceptive.

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<sup>2</sup>See <http://www.ftc.gov/os/closings/staff/061211staffopinioncommercialalert.pdf>.

Where a business crosses the line, the FTC will not hesitate to bring an enforcement action, as it did recently in a case involving *Jumpstart Technologies*. The Commission alleged that Jumpstart offered free movie tickets to consumers in exchange for the names and email addresses of five or more of their friends.<sup>3</sup> Jumpstart then sent the friends commercial emails with the referring consumer's email address in the "from" line and a seemingly personal "subject line," such as, "Hey," or "Happy Valentine's Day," or "Movie time." The emails appeared to come from the referring consumer, circumvented spam filters, and were opened by consumers who thought the messages contained personal correspondence. Our complaint alleged that Jumpstart's deceptive practices violated the FTC Act and the CAN-SPAM Act, including by sending commercial e-mails with false or misleading "subject" and "from" lines. Under the settlement agreement, the defendant is required to pay a \$900,000 civil penalty for violating the CAN-SPAM Act, the largest penalty yet for illegal spam.

In addition to providing business guidance and enforcing laws, we also attempt to ensure

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<sup>3</sup>*United States v. Jumpstart Technologies*, Civil Action No. C-06-2079 (MHP) (N.D.Calif. 2006), available at <http://www.ftc.gov/opa/2006/03/freeflixtix.shtm>.

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<sup>4</sup>*See*

the Guides; and

4. Fourth, that prohibiting advertisers from using atypical testimonials accompanied by a typicality disclaimer would raise Constitutional issues.

We are, of course, carefully considering all of these comments and I am certain that you will hear more from on this subject.

## **II. Targeted Marketing**

The second marketplace shift I would like to discuss is targeted marketing, which again, is not an entirely new concept. If we look back at the 1970s, we saw ads targeted toward particular demographics. Secret deodorant's "strong enough for a man; made for a woman" ads

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<sup>5</sup>See <http://www.ftc.gov/bcp/workshops/ehavioral>.

transparency and consumer control would be a good thing. Third, there are also concerns about what happens to the consumer data collected for advertising. Is it limited to use in advertising, or could it be used for some secondary purpose? Fourth, there are concerns about the security of the data collected. What if it falls into the wrong hands, especially if the data is sensitive or personally identifiable?

All stakeholders, including the FTC, are obviously thinking very seriously about the



there's a law – the Children's Online Privacy Protection Act – that prohibits companies from collection information from children under 13 without parental consent. And the better news is that the FTC is aggressively enforcing this law, most recently, obtaining a \$1 million civil penalty against Xanga.com, a social networking site that collected information in violation of COPPA.<sup>6</sup>

On the health front, there is a belief that the rise in advertising and marketing of food to children is responsible for the obesity epidemic among young people. We at the FTC have no interest in debating how to allocate blame for rising levels of childhood obesity. The simple fact is that our kids are overweight and at risk and we have to do something about it. Parents, schools, government, health care professionals, food companies, and the media all have an obligation to fight this public health crisis, regardless of how we got here.

In 2005, the FTC, together with the Department of Health and Human Services,

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<sup>6</sup>*United States v. Xanga.com*, Civ. Action No. 06-CV-6853 SHS (S.D.N.Y. filed Sept. 7, 2006), available at <http://www.ftc.gov/opa/2006/09/xanga.shtm>.

<sup>7</sup>See <http://www.ftc.gov/bcp/workshops/foodmarketingtokids>.

<sup>8</sup>See <http://www.ftc.gov/bcp/workshops/childobesity/index.shtml>.

For example, nearly a year ago, the Council of Better Business Bureaus and the BBB's National Advertising Review Council announced the Children's Food and Beverage Advertising Initiative, a bold effort to change the profile of food advertising directed to children under 12 and to encourage healthier eating choices. To date, 12 major food companies have joined the Initiative.

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<sup>9</sup>See Federal Trade Commission "Marketing Violent Entertainment to Children," September 2000, available at <http://www.ftc.gov/reports/violence/vioreport.pdf>.

follow-up “mystery shops” – where young teenagers are sent to attempt to buy movie tickets, video games, or explicit music CDs – also documented steady improvement in the enforcement of the movie rating system at theaters and the video game rating system at retail. There remains, however, substantial room for improvement, particularly by CD retailers. We continue to actively monitor this marketplace.<sup>10</sup>

### Conclusion

I have discussed the FTC’s efforts to address some recent shifts in advertising and promotion marketing. But, as we can see, in some ways, the more things change, the more they stay the same. Con artists will continue to exploit new technologies. Businesses will have legitimate questions about how old laws apply to new technologies. And the FTC will remain engaged. Just as we did in the 1970s, when the PMA law conference was in its infancy, we will continue to enforce advertising laws, educate businesses and consumers, and study emerging trends so that we can help consumers and advertisers navigate tumultuous market changes.

Thank you.

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<sup>10</sup>For copies of all FTC reports on media violence, see <http://www.ftc.gov/bcp/online/edcams/ratings/reports.htm>.